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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

—vs—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF
NORTH CAROLINA

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF UTAH FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICUS CURIAE

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MOTION OF THE ATTORNEY GENERAL OF THE STATE OF UTAH FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Comes now the State of Utah, by and through its authorized representative, Vernon B. Romney, Attorney General, State of Utah, and hereby moves this Honorable Court for permission to file the following Brief Amicus Curiae pursuant to Rule 35, Supreme Court of the United

States Revised Rules, as amended, January 15, 1974. Said motion is based upon the fact that the State of Utah has an interest in the outcome of this case, and specifically has an interest in the Court's resolution of the question whether capital punishment, *ipso facto*, is cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution of the United States.

Dated this 10th day of January, 1975.

VERNON B. ROMNEY
Attorney General
State of Utah

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICUS CURIAE

INTEREST OF AMICI

Among its several issues, *Fowler v. North Carolina*, No. 73-7031, presents to this Court the question of whether capital punishment, *ipso facto*, is cruel and unusual punish-

ment within the meaning of the Eighth Amendment to the Constitution of the United States. An adverse decision would have a substantial impact on the criminal judicial system in many states, including Utah. Such a decision would deny unto the states the right to proscribe capital punishment in a fair and just manner for the most aggravated and indefensible of crimes.

STATEMENT OF THE CASE

On July 1, 1973, petitioner got into an argument over a ten dollar bill with the victim while they were involved in a crap game in Raleigh, North Carolina. Later in the day, petitioner left the crap game and went to a local lounge. He was joined there by Griffin and the argument over the money was resumed. The petitioner was asked by Griffin to step outside and when he did so, Griffin struck him breaking his nose. Petitioner went home but later decided to visit a friend who lived in the vicinity where the shooting occurred. When he arrived in the area, Griffin saw him and said he wanted to fight again. Petitioner left the area, but returned shortly and when he saw Griffin walking toward him, he fired twice, striking the victim with the second shot. Griffin died the same day from the wound and on September 27, 1973, petitioner was convicted in the Superior Court of Wake County for first degree murder and sentenced to death.

On Appeal, the North Carolina Supreme Court found no prejudicial error and the judgment was upheld. *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974). This Court granted Certiorari on October 29, 1974.

ARGUMENT

POINT I

CAPITAL PUNISHMENT, *IPSO FACTO*, IS NOT CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The United States Supreme Court has long sought to find a working definition of the Cruel and Unusual Punishment Clause of the Eighth Amendment. In *Trop v. Dulles*, 356 U.S. 86, 99, 1 L.Ed.2d 630, 78 S.Ct. 590 (1958), it was concluded that "the exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court."

It is a long established principle of law that in construing a constitutional amendement the Supreme Court should read the language in connection with the known condition of affairs out of which the occasion for the amendment's adoption may have arisen, and then construe it in a way as to forward the known purpose or object for which the amendment was adopted. *Maxwell v. Dow*, 176 U.S. 581, 602, 44 L.Ed. 597, 20 S.Ct. 448 (1900).

The English Declaration of Rights of 1688 contained the clause that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." I Wm. & Mary, 2d Sess., 192 (1689). The language was transferred verbatim into the Virginia Constitution in 1774 and thereafter adopted by eight other

states and inserted by the federal govrnment into the Northwest Ordinance of 1787. See R. Rutland, *The Birth of the Bill of Rights* 1776-1791, at 30-33 (1955).

The entire clause was adopted and made a part of the Bill of Rights as the Eighth Amendment of the United States Constitution in 1791 with very little discussion. *Weems v. United States*, 217 U.S. 349, 368-69, 54 L.Ed. 793, 30 S.Ct. 544 (1910). However, it is generally accepted that the Eighth Amendment was intended to prohibit the cruel and barbarous punishments formerly imposed in England by the Crown. These punishments were considered at the time to be unnecessarily cruel and bordering upon outright torture, including breaking on the wheel, public dissection and the like. IV Blackstone's Commentaries 376; *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879).

It is important to note that before and after the adoption of the Eighth Amendment, capital punishment for most felonies was the standard practice in all the colonial states. 2 *The Papers of Thomas Jefferson* 313 (J. Boyd ed. 1950). For example, Deleware laws provided for the following penalties: death by hanging, drawing and quartering for the crime of treason; death by burning for the crime of petit treason; and death by hanging for murder and most felonies. It was not until 1826 that the criminal laws were codified in Delaware to provide that all punishment by death shall be by hanging. *State v. Cannon*, 55 Del. 587, 190 A.2d 514, 516-17 (1963).

In summing up the constitutional origin of the Eighth Amendment, Mr. Justice Black in *McGautha v. Califor-*

nia, 402 U.S. 183, 28 L.Ed.2d 711, 91 S.Ct. 1454 (1971), said:

> "The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment." 408 U.S. at 381.

Throughout its history, the United States Supreme Court has recognized the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah, supra; In Re Kemmler*, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States, supra; Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 442, 67 S.Ct. 374 (1947); *Trop v. Dulles, supra; Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968); *MaGautha v. California, supra.*

In *Wilkerson v. Utah, supra*, capital punishment was implicitly upheld when the Court refused to strike down shooting as a cruel and unusual mode of executing a prisoner. The Court held the constitution prohibited circumstances of terror, pain, or disgrace, but that death was a usual punishment for murder. 99 U.S. at 136.

In Re Kemmler, supra, presented the Court with the question as to whether New York's innovative idea of electrocution was cruel and unusual. Although the Court disposed of the case on the ground that the Eighth Amend-

ment was not applicable to the states through the Due Process Clause of the Fourteenth Amendment, it went on to say:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." 136 U.S. at 447.

The modern case of most significance is *Trop v. Dulles, supra,* in which Chief Justice Warren offered this conclusion:

> "(L)et us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment--and they are forceful--the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." 356 U.S. at 99.

In *Trop* the Chief Justice also turned to the meaning of the word "unusual":

> "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . If the word 'unusual' is to have any meaning apart from the word 'cruel', however, the meaning should be the ordinary one, signifying something different from that which is generally done." 356 U.S. at 100 n.32.

During the two hundred year history of our nation capital punishment has been widely used and generally accepted. Unusual punishment is that which is atypical of and not endemic to the mores of the current social order and irregular and unwonted in the administration of criminal justice. Our society expects and demands justice or retribution when certain types of crimes are committed. The social importance for maintaining that capital punishment is not in violation of the Constitution can be summed up in the words of Mr. Justice Stewart in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972):

> "On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve' then there are sown the seed of anarchy--of self-help, vigilante justice, and lynch law." 408 U.S. at 308.

POINT II

CAPITAL PUNISHMENT PROSCRIB-

ED UNDER A REASONABLE AND CONTROLLED DISCRETION DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

In *Furman v. Georgia, supra,* this Court held that capital punishment was unconstitutional in cases where discretionary sentencing procedures resulted in arbitrary and discretionary application of the penalty.

Although nine separate opinions were written in *Furman,* one common concern can be inferred from the concurring opinions. It is best summed up by Mr. Chief Justice Burger in his dissent:

> "The decisive grievance of the [concurring] opinions--not translated into Eighth Amendment terms--is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern." 408 U.S. at 398.

Although the Court held that the Texas and Georgia death penalty statutes were unconstitutional, a majority did not find that capital punishment per se was unconstitutional. 408 U.S. at 375. Thus, the decision did not preclude state legislatures from attempting to enact constitutionally acceptable death penalty laws, and in the two years since *Furman,* more than half the states have enacted statutes which either specify the factors to be weighed by

the sentencers in deciding when to impose a capital sentence or require the death penalty for certain offenses.[1]

In 1973, the Utah Legislature drafted a new criminal code designed to overcome the United States Supreme Court's concern with arbitrariness. Murder in the first degree was designated as a capital offense in that new code. Utah Code Ann. § 76-5-202 (Supp. 1973), states:

> "(1) Criminal homicide contitutes murder in the first degree if under circumstances not constituting manslaughter, the actor intentionally or knowingly causes the death of another under any of the following circumstances:
>
> (a) The homicide was committed by a convict under sentence of imprisonment.
>
> (b) At the time the homicide was committed the actor also committed another homicide.

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[1] *See* Ariz. Rev. Stat. Ann. §§ 13-452, 1454 (Supp. 1973); Ark. Stat. Ann. §§ 41-4702, -4710 to -4714 (Cum. Supp. 1973); Cal. Penal Code §§ 189, 190.1-3, 209 (West Supp. 1974); P.A. 73-137, [1973] Conn. Leg. Serv. 184 (West); Del. ch. 284, 127th General Assembly (March 29, 1974); Fla. Stat. Ann. §§ 782.04, 794.01, 921.141 (Cum. Supp. 1974); Ga. Code §§ 26-3102, 27-2534.1, -2537 (Supp. 1973); ch. 276, [1973] Idaho Laws 588; Ill. Rev. Stat. ch. 38,§§ 9-1, 1005-5-3, -8-1A (1973); Ind. Ann. Stat. § 10-3401 (Supp. 1973); Ky. ch. 406, §§ 60, 61, 275, 1974 General Assembly (Apr. 2, 1974); La. Rev. Stat. Ann. § 14:30 (Supp. 1974); Miss. ch. 576, 1974 General Assembly (Apr. 23, 1974); Mont. Rev. Codes Ann. § 94-5-105 (Spec. Crim. Code Supp. 1973), *as amended,* ch 262, 43rd Legislative Assembly (March 21, 1974); Neb. Rev. Stat. §§ 28-401, 29-2521 to -2523 (Supp. 1973); Nev. Rev. Stat. § 200.030 (1973); N.H. ch. 34, 1974 General Court Spec. Sess. (Apr. 3, 1974); N.M. Stat. Ann. § 40A-29-2 (Supp. 1973); N.Y. ch. 376, 1974 Legislative Assembly (May 6. 1974); N.C. ch. 20, 1973 General Assembly,2d Sess. (Apr. 8, 1974); Ohio Rev. Code Ann. §§ 2903.02-04 (Page Spec. Supp. 1973); Okla. Stat. Ann. tit. 21, § 701.1-3 (Supp. 1973); Pa. Act No. 46, 158th General Assembly (March 26, 1974); R.I. Gen. Laws Ann. § 11-23-2 (Supp. 1973); Tenn. Code Ann. §§ 39-2402, -2406 (Cum. Supp. 1973); Wyo. Stat. Ann. § 6-54 (Supp. 1973).

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, forcible sodomy, or aggravated sexual assult or arson, burglary, or kidnapping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under color of legal authority or for the purpose of effecting an escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) After having previously been convicted of first or second degree murder.

(h) The homicide was committed upon a child under the age of twelve years as the result of physical abuse or neglect.

Failure on the part of a parent, guardian or custodian of a child under the age of twelve years to satisfactorily explain injuries or neglect causing death where suspicious circumstances exist, unless such person can explain his lack of knowledge thereof, shall be deemed prima facie evidence of guilt.

(2) Murder in the first degree is a capital offense."

After a defendant has been found guilty of first degree murder, he is sentenced in compliance with the following two statutes:

"76-3-206. Capital felony—Death or life imprisonment.—A person who has been convicted of a capital felony shall be sentenced in accordance with section 76-3-207, and sentence shall be death or life imprisonment as the court or jury, in accordance with this section, shall determine."

"76-3-207. Capital felony—Hearing on sentence.—(1) When a defendant has been found guilty of a capital felony, there shall be further proceedings before the court or jury on the issue of penalty. The proceedings shall be conducted before the court or jury which found the defendant guilty, provided the defendant may waive hearing before the jury, in which event the hearing shall be before the court. In these proceedings, evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravated or mitigation of the penalty. Any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against sentence of death. Aggravating circumstances shall include those as outlined in 76-5-202. Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The defendant acted under extreme duress or under the substantial domination of another person;

(d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;

(e) The youth of the defendant at the time of the crime;

(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(g) And any other fact in mitigation of the penalty.

(2) The court or jury, as the case may be shall retire to consider the penalty. In all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous verdict for death and that to be imposed if a unanimous verdict for death is not found. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death, the court shall discharge the jury and impose the sentence of life imprisonment.

(3) Upon any appeal by the defendant where the sentence is of death, the supreme court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which

event the trial court shall impose the sentence of life imprisonment."

The Utah statutes are drafted to narrow and guide the discretion of the sentencing authority to impose the death penalty only for the most outrageous and shocking types of willful and intentional murder. A defendant can only be convicted of a capital murder if the murder was committed under one of the aggravating circumstances listed in Utah Code Ann. § 76-5-202(1) (Supp. 1973). Even after his conviction, the defendant is provided with three steps between conviction and imposition of the death penalty. Each step provides concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

First, there must be a post-conviction hearing on the issue of the penalty (Section 76-3-207). The statute specifies that "evidence may be presented as to any matter the court deems relevant to sentence," and the exclusionary rules of evidence are not to apply. Therefore, the defendant would be allowed to present evidence at the hearing which might have been barred or withheld from a trial on the issue of guilt or innocence.

Concerning the purpose of allowing the trial judge to determine the relevancy of the evidence in the sentencing hearing, the Florida Supreme Court in *State v. Dixon*, 283 S.2d 1 (Fla. 1974), said:

> "The discretion of the trial judge in determining what evidence might be relevant to the sentence is not unbridled. It is merely a necessary power to avoid a needlessly drawn out pro-

ceeding where one party might choose to go forward with evidence which bears no relevance to the issue being considered." 283 S.2d at 7.

The statute specifically provides that the defendant may have the advantage of presenting evidence in support of mitigation of the penalty. The statutes proceed to list certain mitigating circumstances, but the list is not inclusive. The defendant is allowed to introduce any evidence that might have a probative force on the issue of sentencing.

The second step of the sentencing procedure is that the court or jury which convicted the defendant must hear the evidence presented at the sentencing hearing. Concerning the purpose of the jury in this situation, the court in ***State v. Dixon, supra,*** stated:

> "They must consider from the facts presented to them--facts in addition to those necessary to prove the cimmission of the crime--whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty." 283 S.2d at 8.

By providing a separate hearing, the jury can make the decision concerning the penalty without the issue of guilt or innocence interfering. They can give their complete and undivided attention to any mitigating circumstances and the defendant has the opportunity to present almost any evidence as to why his crime does not merit the death penalty. The fact that the defendant has merely been convicted of the crime does not demand that his life automatically be taken. The inherent and necessary ingredient

of mercy is allowed to express itself in our judicial system, through our time honored and tested system of a unanimous jury verdict. Since the beginning of our nation our judicial system has entrusted the most complicated and demanding decisions to juries trusting in a panel of the defendant's peers to provide evenhanded justice. By limiting the range of the juries' discretion to hand out the death penalty, Utah's statute insures a disposition of equal justice.

The final step providing safeguards to a defendant is provided by Section 76-3-207(3), which provides that "upon *any* appeal by the defendant where the sentence is of death, the supreme court, if it finds prejudicial error *in the sentencing proceedings only,* may set aside the sentence of death. . . ." (Emphasis added.) This protection insures that, regardless of what theory an appeal is made, the defendant can be sure that the highest court of the state will thoroughly review the sentencing process to ascertain whether that defendant has received every protection guaranteed to him by the law. If the court finds any error is prejudicial to the defendant the sentence of death must be set aside.

Discretion is inherent in the progression of our judicial system, from arrest, arraignment, trial, verdict, and onward through final appeal. Even this Court's "decision to grant or deny certiorari," by law, discretionary and the decision to hear argument on appeal has of necessity also come to depend on an element of discretion." *Goldberg v. Dershowitz, Declaring the Death Penalty Unconstitutional,* 83 Harv. L. Rev. 1773, 1803. Even after the final appeal is finished, complete discretion remains in the ex-

ecutive branch of government to honor or reject a plea for clemency. See U.S. Constitution, Art. II, § 2.

Therefore, it is not discretion per se which is condemned by our Constitution, but arbitrary and unguided discretion that does not produce evenhanded justice. The Utah statute provides controls and guidelines to insure that the penalty of death is given only for the most aggravated and indefensible of crimes.

Regardless of individual opinions concerning capital punishment, there should be a proper recognition of the respective roles of the legislative and judicial branches respecting crime and punishment. In his dissent in *Furman*, Mr. Justice Powell said:

> "The designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies. When asked to encrouch on the legislative preorogative, we are well counseled to proceed with the utmost reticence. The review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as 'the gravest and most delicate duty that this Court is called on to perform.' " 408 U.S. at 431. (Citation omitted.)

The Utah Legislature has provided a system whereby aggravating and possible mitigating circumstances are defined, but the weighing process and final determinating is left to the carefully scrutinized judgment of jurors and judges. The vital need to allow legislatures to draft reasonable and controlled death penalty statutes was amply expressed by the North Carolina Supreme Court

in *State v. Jarrette*, 284 N.C. 625, 202 S.Ed.2d 721, 747 (1974):

> "Whether the imposition of the death penalty in such a case will be futile in deterring others from like acts is, necessarily, a matter of opinion, upon which reasonable minds may and do differ. The steadily rising tide of crimes of the most serious nature, throughout the nation, has occurred in an era of unprecedented permissiveness in our society and of emphasis on sympathy for the accused rather than for his victim and those endangered by him. This is ample basis for reasonable men to conclude that some punishment of exceptionally vicious crimes, other than imprisonment coupled with careful organized programs for rehabilitation designed to assure the prisoner that he has the sympathy of society, is necessary to bring about the turning of the tide."

CONCLUSION

For the reasons stated above, the judgment should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General
State of Utah

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UNITED STATES
OCTOBER TERM, 1974

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner,
-vs-
STATE OF NORTH CAROLINA,
Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court Rules, 28 U.S.C., the Attorney General of the State of Utah certifies that the following parties at each of the following addresses have been served with the required three copies of the Brief of the Attorney General of the State of Utah, Amicus Curiae: Mr. Jack Greenberg, Mr. James N. Nabrit, III Mr. David Evan Kendall, and Ms. Peggy C. Davis, NAACP Legal Defense and Education Fund, 10 Columbus Circle, New York, New York 10019; Mr. Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305; Mr. Adam Stein and Mr. Charles L. Beckston, 157 East Rosemary Street, Chapel Hill, North Carolina 27514; and Mr. Jean Benoy, P. O. Box 629, Raleigh, North Carolina 27602; by depositing same in the United States Mail, postage prepaid, this 10th day of January, 1975.

VERNON B. ROMNEY
Attorney General
State of Utah
236 State Capitol
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